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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SEUM SISAVATH, Defendant and Appellant.	F041885 (Super. Ct. No. 671573-4) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Franklin P. Jones, Judge.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Jeffrey D. Firestone and Kelly C. Fincher, Deputy Attorneys General, for Plaintiff and Respondent.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts I.B, II, III, IV, and V.

In this case we apply the recent decision of the Supreme Court in *Crawford v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 1354] to a child victim's hearsay statements admitted in a sexual abuse prosecution under Evidence Code section 1360. In *Crawford*, the court announced the new rule that the admission of "testimonial" hearsay statements against a criminal defendant violates the Confrontation Clause of the Sixth Amendment if the declarant is unavailable to testify at trial and the defendant had no previous opportunity to cross-examine. In the published part of this opinion, we hold that the hearsay statements challenged here were inadmissible under the *Crawford* rule. The error necessitates the reversal of four of defendant Seum Sisavath's abuse convictions. Five other abuse conviction and two convictions for drug possession are unaffected.

In the unpublished part of this opinion, we consider defendant's four other grounds for appeal: 1) improper admission of expert testimony; 2) penalizing defendant for exercising his right to remain silent; 3) improper amendment of the information; and 4) cumulative error. We reject each of these.

The judgment is affirmed in part, reversed in part, and remanded.

FACTUAL AND PROCEDURAL HISTORIES

Defendant was an acquaintance of Ly N., the mother of an 8-year-old (Victim 1) and a 4-year-old (Victim 2). He was introduced to Ly by Ly's ex-husband, who sometimes had defendant care for Victim 1 and Victim 2. Over a period of about five months, from September 2001 to January 2002, defendant visited on several occasions with Victim 1 and Victim 2 at Ly's apartment. He sometimes spent the night in the living room or in the children's bedroom. Occasionally, he took the children away with him.

On January 29, 2002, Victim 2 told her mother that defendant had touched her private parts the night before. When questioned by her mother, Victim 1 made similar statements. Ly called the police. The responding officers took statements from Ly, Victim 1, and Victim 2. When defendant came to the house later that evening, Ly called

the officers and they returned and arrested defendant. He had cocaine and marijuana in his pants pockets when he was arrested.

The police investigation revealed evidence of numerous instances of sexual abuse of Victim 1 and Victim 2. Defendant was charged by information with 10 counts of sexual abuse and two counts of narcotics possession. The sexual abuse charges fall into three groups according to the dates of the offenses. Counts 1, 2, and 3 charged that between November 1, 2001 and January 1, 2002, defendant committed two forcible lewd acts upon Victim 1 (Pen. Code, § 288, subd. (b)(1))[1] and an assault of Victim 1 with intent to commit rape (§ 220). Counts 4 through 8 charged defendant with committing the following offenses on January 28 or January 29, 2002: an aggravated child sexual assault, forcible sexual penetration of Victim 1 (§ 269, subd. (a)(5)); an aggravated child sexual assault, forcible rape of Victim 1 (§ 269, subd. (a)(1)); a forcible lewd act upon Victim 1 (§ 288, subd. (b)(1)); an aggravated child sexual assault, forcible sexual penetration of Victim 2 (§ 269, subd. (a)(5)); and a forcible lewd act upon Victim 2 (§ 288, subd. (b)(1)). Counts 9 and 10 charged that between May 1, 2001 and January 27, 2002, defendant committed one lewd act (§ 288, subd. (a)) upon Victim 2 at her house and another in his truck. Count 11 charged possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), and count 12 charged possession of marijuana (Health & Saf. Code, § 11357, subd. (b)). The information included multiple-victim allegations as to counts 1 through 10 pursuant to section 667.61, subdivision (b).

Trial evidence included testimony by Victim 1, a videotaped statement by Victim 2, and a police officer's testimony describing statements by Victim 1 and Victim 2. DNA test results were also introduced, showing that defendant's semen was found on a pair of panties on which cells from Victim 1 were also found. Other DNA test results showed that defendant's semen was on a blanket found in the children's bedroom.

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[1] All statutory references are to the Penal Code unless indicated otherwise.

An expert on Child Sexual Abuse Accommodation Syndrome gave testimony bearing mainly on why a sexually abused child might not immediately report the abuse. A jury found defendant guilty of count 1 and counts 4 through 12. He was found guilty of the lesser-included offense of simple assault (§ 240) on count 3 and acquitted of count 2. The multiple-victim allegations were found true. The court sentenced defendant to an aggregate term of 32 years to life.

DISCUSSION

I. Victim hearsay statements

At trial the prosecution proffered Victim 2 as a witness. The court conducted a hearing to determine whether she was qualified to testify. After Victim 2 failed to respond to most of the questions that she was asked, the court concluded that she was disqualified because she could not express herself so as to be understood (Evid. Code, § 701, subd. (a)) and because she was incapable of understanding her duty to tell the truth (Evid. Code, § 701, subd. (b)).

Then the court took up the prosecution's contested motion to admit two sets of Victim 2's out-of-court statements pursuant to Evidence Code section 1360. They were a statement to Officer Matthew Vincent, one of the officers who responded when Ly called the police, and a videotaped interview with a trained interviewer at Fresno County's Multidisciplinary Interview Center (MDIC). The MDIC is a facility specially designed and staffed for interviewing children suspected of being victims of abuse.

The court took testimony by Vincent and an investigator from the District Attorney's office who attended the MDIC interview. On the basis of this testimony, the court found sufficient indicia of reliability. It also ruled that Victim 2 was unavailable to testify because of the disqualification ruling. Finding that the other requirements of Evidence Code section 1360 were satisfied, the court admitted the statements.

In his opening and reply briefs, defendant argued that hearsay statements by Victim 2 were improperly admitted at trial under the hearsay exception created by

Evidence Code section 1360. While this appeal was pending, the Supreme Court announced its decision in *Crawford v. Washington, supra*, 124 S.Ct. 1354. *Crawford* announced a new rule regarding the effect of the Confrontation Clause on the admission of hearsay statements in criminal prosecutions. "[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final …." (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.) At our request, the parties submitted supplemental briefs on the effect of *Crawford* on the admissibility of Victim 2's statements.

A. Effect of Crawford on the admissibility of Victim 2's statements

In *Crawford*, the defendant was convicted of assault with a deadly weapon, partly on the basis of his wife's out-of-court, tape-recorded statement to police. The wife did not testify because the defendant invoked the spousal privilege. There was no pre-trial opportunity for the defendant to cross-examine. After finding that the statement bore adequate indicia of reliability, the trial court admitted it into evidence based on the hearsay exception for statements against penal interest, because the wife was arguably a participant in the crime her statement described. (*Crawford v. Washington, supra,* 124 S.Ct. at pp. 1356-1358.)

The Supreme Court held that admission of the statement violated the Confrontation Clause. Where a hearsay statement is "testimonial," the Confrontation Clause bars the prosecution from using it against a criminal defendant unless the declarant is available to testify at trial, or the defendant had a previous opportunity to cross-examine the declarant. (*Crawford v. Washington, supra*, 124 S.Ct. at pp. 1363-1367.) The court held that this is so regardless of whether or not the statement falls within a state-law hearsay exception or bears indicia of reliability, overruling *Ohio v. Roberts* (1980) 448 U.S. 56. (*Crawford, supra,* at pp. 1369-1372.) It considered, without deciding, that testimonial dying declarations might be an exception to this bar and stated that they would be the only exception. (*Id.* at p. 1367, fn. 6.)

There is no doubt here that Victim 2 was made unavailable to testify by the disqualification ruling and no contention that defendant had a pre-trial opportunity to cross-examine her. The important question, therefore, is whether her statements to Officer Vincent and in the MDIC interview were "testimonial."

The Supreme Court declined to define this key term. "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" (*Crawford v. Washington, supra*, 124 S.Ct. at p. 1374.) But it did list "[v]arious formulations" of the class of testimonial statements:

> "'*[E]x parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1364.)

The court further stated that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1374.) The court used the term "'interrogation'" in "its colloquial, rather than any technical legal, sense." It reasoned that the statement at issue in the case was "knowingly given in response to structured police questioning" and consequently "qualifie[d] under any conceivable definition." (*Id.* at p. 1365, fn. 4.)

It is clear that Victim 2's statement to Officer Vincent was testimonial under *Crawford*. This statement was "knowingly given in response to structured police questioning." The People concede this.

The status of the MDIC interview statement is less obvious. The People contend that it is not testimonial. We disagree. The MDIC interview took place on June 12,

2002. By that time, the original complaint and information had been filed[2] and a preliminary hearing had been held. The deputy district attorney who prosecuted the case was present at the interview, along with an investigator from the district attorney's office. The interview was conducted by a "forensic interview specialist." Under these circumstances, there is no serious question but that Victim 2's statement was "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford v. Washington, supra,* 124 S.Ct. at p. 1364.)[3]

The People argue that the statement was not testimonial because the interviewer was "not a government employee"; the MDIC is a "neutral location"; the interview might have been intended for a therapeutic purpose or related to removal proceedings and not intended for a prosecutorial purpose; the interview was not prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and it was not a police interrogation. They suggest we should either hold that the interview was not testimonial or remand for a finding on the purpose of the interview.

There is no need for a remand on this issue. None of the People's arguments are persuasive. The pertinent question is whether an objective observer would reasonably expect the statement to be *available for use* in a prosecution. Victim 2's interview took place after a prosecution was initiated, was attended by the prosecutor and the prosecutor's investigator, and was conducted by a person trained in forensic

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[2]The People dismissed the information before the interview. A new complaint and information were filed after the interview.

[3]Conceivably, the Supreme Court's reference to an "objective witness" should be taken to mean an objective witness in the same category of persons as the actual witness—here, an objective four-year-old. But we do not think so. It is more likely that the Supreme Court meant simply that if the statement was given under circumstances in which its use in a prosecution is reasonably foreseeable by an objective observer, then the statement is testimonial.

interviewing. Under these circumstances, it does not matter what the government's actual intent was in setting up the interview, where the interview took place, or who employed the interviewer. It was eminently reasonable to expect that the interview would be available for use at trial. Nor does it matter that the interview was not part of one of the proceedings the Supreme Court mentioned by name. The court made it clear that it was not giving an exhaustive list.

We have no occasion here to hold, and do not hold, that statements made in every MDIC interview are testimonial under *Crawford*. We hold only that Victim 2's statements in the MDIC interview in this case were testimonial.

For these reasons, the admission of Victim 2's statements to Officer Vincent and in the MDIC interview violated the Confrontation Clause. In light of this conclusion, we need not discuss defendant's argument that the statements should have been excluded under Evidence Code section 1360.

B. Effect on the convictions of the erroneous admission of Victim 2's statements

With respect to each count of which defendant was convicted, we must determine whether the error of admitting Victim 2's statements was harmless beyond a reasonable doubt. This harmless-error standard applies because the admission of Victim 2's statements was a federal constitutional error. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Boyette* (2002) 29 Cal.4th 381, 428.) The *Chapman* standard "'requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the [result] obtained.' [Citation.]" (*People v. Neal* (2003) 31 Cal.4th 63, 86.) "'To say that an error did not contribute to the [result] is … to find that error unimportant in relation to everything else the [factfinder] considered on the issue in question, as revealed in the record.' [Citation.]" (*Ibid.*)

We begin with two counts that require little discussion. Counts 11 and 12, the drug possession charges (Health & Saf. Code, §§ 11350, subd. (a), 11357, subd. (b)), were supported by a police officer's testimony that he found apparent marijuana and cocaine in defendant's pockets when he arrested him and by a criminalist's testimony that the substances found tested positive for marijuana and cocaine. Victim 2's statements had no bearing on these convictions. They are affirmed.

Counts 9 and 10, each charging a lewd act (§ 288, subd. (a)) against Victim 2 between May 1, 2001 and January 27, 2002, also require little discussion. The only evidence in the record regarding offenses against Victim 2 earlier than January 28, 2002 (i.e., the night before defendant's arrest), was Victim 2's description of them in her out-of-court statements. Neither Victim 1's statement to Officer Vincent nor Victim 1's live testimony contains evidence of these offenses. Without Victim 2's statements, there is no evidence to support the convictions. They must be reversed.

Count 1, charging a forcible lewd act (§ 288, subd. (b)(1)) against Victim 1 between November 1, 2001 and January 1, 2002, also must be reversed. Victim 1 told Officer Vincent that defendant put his thumb in her vagina during this time period, and Victim 2's statement at the MDIC corroborated this. Without Victim 2's statement, the conviction on count 1 rests on Victim 1's statement alone. Although Victim 1's statement constitutes evidence on the basis of which a reasonable jury could convict, we cannot say that the erroneous admission of Victim 2's corroborating statement was harmless beyond a reasonable doubt. The record shows that the jury was sometimes unwilling to convict on the basis of Victim 1's statement or testimony alone. The jury acquitted defendant of count 2, which charged a second forcible lewd act (§ 288, subd. (b)(1)) against Victim 1 between November 1, 2001 and January 1, 2002. The evidence of conduct that would support a second charge under section 288, subdivision (b)(1), during this time consisted of Victim 1's uncorroborated statements to Officer Vincent that defendant made her rub his penis with her feet on one occasion, and tried to make

her sit on his penis on another occasion. This would have constituted sufficient evidence to support a conviction, but the jury decided to acquit. Similarly, on count 3, the jury acquitted defendant of the charged offense, assault of Victim 1 with intent to commit rape (§ 220), and convicted him of the lesser-included offense of simple assault (§ 240) during the period between November 1, 2001 and January 1, 2002. The evidence in support of the charge is the same as the evidence in support of count 2. We might not be able to say that there was insufficient evidence if the jury had convicted defendant of the charged offense, but it chose not to do so. The jury's action on counts 2 and 3 supports our conclusion that a reasonable doubt exists as to whether the result on count 1 would have been different without Victim 2's statements.

On count 3, we affirm defendant's conviction of the lesser-included offense, simple assault (§ 240). Victim 2's erroneously admitted statements have no effect on this conviction. Assuming Victim 1 and Victim 2's statements that defendant inserted his thumb into Victim 1's vagina were the basis of the offense charged in count 1, the evidence presented in support of count 3 consisted of Victim 1's statements that defendant made her touch his penis with her feet and tried to make her sit on his penis. The jury found a simple assault on this basis. There is no reason to disturb its verdict.

We affirm the convictions on counts 4, 5, and 6, respectively, charging aggravated sexual assault based on forcible penetration (§ 269, subd. (a)(5)), aggravated sexual assault based on forcible rape (§ 269, subd. (a)(1)), and a forcible lewd act (§ 288, subd. (b)(1)), all against Victim 1 on the night before defendant's arrest. These convictions were supported by the following items of evidence: Victim 1's statement to Officer Vincent that on that night, defendant unbuttoned her pants, touched her private area, and then inserted his thumb into her vagina; Victim 1's testimony that defendant put his thumb or finger in her vagina; Victim 1's testimony that defendant put his penis in her vagina; DNA evidence showing that defendant's semen was on a pair of Victim 1's underpants on which Victim 1's DNA was also found; and DNA evidence showing that

defendant's semen was on a blanket found in the children's bedroom. The support for these three charges in Victim 2's statements was limited to her assertion to Officer Vincent that defendant touched both sisters' private areas on the night before defendant's arrest.

Victim 1's testimony, Victim 1's statement to Officer Vincent, and the DNA evidence constitute a very strong case on counts 4, 5, and 6. Victim 2's corroboration of these facts was of slight importance. There is no reasonable doubt that the result on these charges would have been the same without Victim 2's statements.

We reverse the conviction on count 7, aggravated sexual assault based on forcible penetration (§ 269, subd. (a)(5)), against Victim 2 on the night before defendant's arrest. This conviction was based on Victim 2 and Victim 1's statements to Officer Vincent that defendant put his pinky in Victim 2's vagina that night. Absent Victim 2's statement, the conviction would rest on Victim 1's statement alone. As with count 1, we conclude that a reasonable jury could convict on the basis of Victim 1's statement alone, but that the error of admitting Victim 2's statement nevertheless was not harmless beyond a reasonable doubt.

We affirm the conviction on count 8, which charged a forcible lewd act (§ 288, subd. (b)(1)) against Victim 2 the night before defendant's arrest. The evidence supporting this charge was Victim 1's statement to Officer Vincent that defendant tried to kiss Victim 2 with his tongue that night. Victim 2's statements did not include this fact, so their erroneous admission does not affect the conviction on this count.

In summary, we affirm the convictions on counts 4, 5, 6, 8, 11, and 12, and on the lesser-included offense on count 3. We reverse the convictions on counts 1, 7, 9 and 10 because the error of admitting Victim 2's statements was not harmless beyond a reasonable doubt with respect to these counts. We note, finally, that the multiple-victim allegation stands only with respect to counts 6 and 8 because section 288,

subdivision (b)(1), is now defendant's only offense among those enumerated in section 667.61, subdivision (c), as to which there was more than one victim.

II. Expert testimony

Defendant argues that certain expert testimony was inadmissible. Acknowledging that his counsel did not object to the testimony, he argues that the failure to do so constituted ineffective assistance of counsel. We conclude that the testimony was admissible, and, even if it were not, the failure to object did not constitute ineffective assistance of counsel.

Dr. Randall Robinson, a psychologist, testified as an expert for the prosecution. Her testimony related to Child Sexual Abuse Accommodation Syndrome (CSAAS). Expert testimony on CSAAS is admissible, not to show that an alleged victim was in fact abused, but to dispel common misconceptions about sexually abused children. (*People v. Bowker* (1988) 203 Cal.App.3d 385, 391-392.) Defendant did not object to the expert's testimony on CSAAS at trial and does not argue now that this testimony is inadmissible. Instead, defendant focuses on a few specific statements made by the expert.

On direct examination, Dr. Robinson testified that there is a misconception that an abused child will immediately report the abuse. In fact, Dr. Robinson testified, children, especially small children, typically do not report abuse immediately. This is because they lack a vocabulary to describe the experience, hesitate to challenge the judgment of parents who allow abusers to have contact with them, and fear the disruption their report may cause. She also testified that a child reporting sexual abuse may modify his or her report in reaction to an adult's negative reaction. The following exchange came next:

> "[The prosecutor:] … When you say modify, are you talking about the child taking back something they said or are you talking about the child making up something that didn't happen?
>
> "[Dr. Robinson:] Mostly I'm talking about a child retracting a disclosure.

> "[The prosecutor:] In your experience, do children make up being sexually abused?
>
> "[Dr. Robinson:] In my experience, children do not make up being sexually abused.
>
> "[The prosecutor:] Why is that?
>
> "[Dr. Robinson:] The reason for that is the reason why adults don't report this for decades. Because it is shameful, it is humiliating. It is bewildering and it's a betrayal of the most important trust that a child has of the primary caretakers. It's--it's rather excruciating for a child to report this to begin with. Children make up things that make them feel good, not that make them feel bad."

Dr. Robinson repeated on cross-examination that, in her experience, small children do not fabricate stories of sexual abuse.

Defendant argues that Dr. Robinson's assertion that children do not invent such stories was equivalent to saying that Victim 1 and Victim 2 told the truth. Therefore, defendant contends, the testimony falls within cases holding that opinion testimony regarding the veracity of witnesses is inadmissible. (See *People v. Melton* (1988) 44 Cal.3d 713, 744; *People v. Smith* (1989) 214 Cal.App.3d 904, 915; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40.)

We disagree. The testimony comes within the rule of *Bowker* that CSAAS testimony is admissible to dispel common misconceptions about child sexual abuse victims. It is true, of course, that statements about what a child who has *not* been abused is likely to say or do is not directly concerned with CSAAS. But in the context of Dr. Robinson's other testimony, the statement that in her experience small children do not fabricate accounts of sexual abuse was elicited to clarify her CSAAS testimony. It was relevant to explain what she meant by saying that a child may "modify" an account of abuse.

Further, defendant is incorrect in asserting that the testimony was directed specifically toward the veracity of Victim 1 and Victim 2. The statements were general.

They concerned small children as a class and they included the qualifier "in my experience." Dr. Robinson did not claim to have any personal experience with Victim 1 and Victim 2. In fact, defense counsel elicited an even stronger statement of these limitations on cross-examination:

> "[Defendant's counsel:] Did you say that kids never make up sexual abuse?
>
> "[Dr. Robinson:] I said in my experience, children do not allege sexual abuse that has not occurred.
>
> "[Defendant's counsel:] Children that you've come into contact with?
>
> "[Dr. Robinson:] Yes.
>
> "[Defendant's counsel:] So do you know if children in society have never made up sexual abuse?
>
> "[Dr. Robinson:] I'm not stating that. I'm stating that young children don't--in the literature and in my experience and in the experience of colleagues with whom I consult, small children do not allege sexual abuse when it has not occurred. Teenagers sometimes can be more manipulative and have a very calculated way of trying to get somebody in trouble. But in my experience, I don't know of small children, elementary or preschool age children, alleging sexual abuse that has not occurred."

The details of the *Bowker* case are instructive. There, the court held a CSAAS expert's testimony inadmissible because the prosecution covertly used that testimony to apply CSAAS as a diagnostic tool showing that the victims in the case had been molested. The testimony was "replete with comments designed to elicit sympathy for child abuse victims and solicitations that children should be believed." (*People v. Bowker, supra*, 203 Cal.App.3d at p. 394.) The expert "in effect said regardless how inconsistent a child's accounts of abuse are, abused children give inconsistent accounts and are credible nonetheless." (*Ibid*.) The expert made comments tying his CSAAS opinions specifically to the alleged

victims in the case. And the expert set forth the CSAAS theory in a way designed to encourage the jury to "pigeonhole the facts of the case" into his account. (*Id.* at p. 395.) Defendant does not contend, and the record does not indicate, that these tactics were used here.

Even if Dr. Robinson had given inadmissible testimony, defense counsel's failure to object to it would not constitute ineffective assistance of counsel. In considering a claim of ineffective assistance of counsel, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) Here, defendant concedes that his trial counsel was attempting to exploit Dr. Robinson's testimony on cross-examination by eliciting a statement that a child might invent a story of sexual abuse "under threat of being physically abused by someone else." This was an effort to support the defense theory that Ly was using the children to punish defendant for criticizing her to the children's father and that she secured their cooperation by threatening to hurt them. Defendant has not overcome the presumption that this strategy might be considered sound. He points out that his trial counsel's effort to obtain helpful testimony from Dr. Robinson failed. But "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight," (*ibid.*) and we cannot say that counsel should have known in advance that his strategy would fail.

III. Right to remain silent

After his arrest, defendant was interviewed by a police detective. The interview was videotaped and transcribed. The detective read defendant his *Miranda* rights and explained those rights in response to defendant's questions about them. Then defendant engaged in a discussion with the detective that fills 15 pages of the transcript. During this discussion, defendant indicated several times that he was considering getting a

lawyer. In giving the *Miranda* warnings, the detective explained that a lawyer could be provided free of charge. But, late in the discussion, it appeared that defendant still believed he would have to pay for a lawyer; the detective had to explain again that he would not. Finally, defendant invoked his right to an attorney and the detective terminated the interview.

The videotape was admitted into evidence. It was played for the jury, and copies of the transcript were provided during deliberations.

The prosecutor referred to the interview in her closing argument. She characterized some of defendant's comments as a failure to proclaim innocence: "So he is not even saying or denying. He's saying--he's dancing around the whole issue. He's not answering direct questions. When you're not guilty of something, you're going to say I didn't do it. What are you talking about?" Defense counsel objected, saying, "She's completely wrong." The court overruled the objection.

Defendant now argues that the prosecutor's comments violated his constitutional right to remain silent. He does not argue that his statement to the police should not have been admitted into evidence, but only that the prosecutor's comment on it was improper and constituted prosecutorial misconduct.

It has been held that due process principles and the Fifth Amendment privilege against self-incrimination both prohibit using a criminal defendant's exercise of his right to remain silent as evidence of his guilt. (*Doyle v. Ohio* (1976) 426 U.S. 610, 618; *U.S. v. Bushyhead* (9th Cir. 2001) 270 F.3d 905, 913.) Silence, statements invoking the right to remain silent, and statements which fail to proclaim innocence and precede invocation of the right to remain silent, have all been held protected from use by the prosecution to show guilt. (*Doyle v. Ohio, supra*, 426 U.S. at p. 614, fn. 5 & pp. 617-618 [treating the same as silence the defendant's question "[w]hat's this all about?" asked prior to his invocation of the right to remain silent]; *Wainwright v. Greenfield* (1985) 474 U.S. 284, 295, fn. 13 ["silence does not mean only muteness; it includes the statement of a desire to

remain silent, as well as of a desire to remain silent until an attorney has been consulted"]; *U.S. v. Bushyhead, supra,* 270 F.3d at pp. 911, 913 [treating the same as silence the defendant's statement, "'I have nothing to say, I'm going to get the death penalty anyway'"].) Evidence of silence or of these kinds of statements cannot be admitted and prosecutorial comments on them are prohibited. (*Ibid.*)

We conclude that the present case does not fall within *Doyle* and its progeny because, contrary to the prosecutor's remarks, defendant actually did twice protest his innocence during the police interview. On the first occasion, defendant said he wanted to talk with Ly before responding to the detective's questions about whether he had touched the girls inappropriately. The detective said he thought that was a bad idea because it might make defendant change his story. This exchange followed:

> "[Detective:] … You know, we're both stuck in a situation here, because I want to find out the truth. Because I think that's only right that I try and do the best that I can to find out the truth for the little girl. And I understand your part, you're stuck in the middle because you're not quite sure what you did might have been right. You're not quite sure you might.....
>
> "[Defendant:] No, I'm … positive that you know, that not happen."

The second time, the detective was continuing to press defendant to explain what happened:

> "[Detective:] … I think you know there's something that happened and I think you know the truth[.]
>
> "[Defendant:] Yes sir.
>
> "[Detective:] And it has something to do with the child.`
>
> "[Defendant:] Of course I know what happened. At night I sleep and you know, like how we sleep, you know we are hug like … daughter, like you know....
>
> "[Detective:] Uh huh ….

> "[Defendant:] Like so young you know, and then there's nothing more than that. It's like okay they take off their pants they have their boxers on this girl too, and then I got my short on you know at night time we playing around you know....that's all we do."

If it were not for these two statements, we would be faced with the interesting question of whether defendant's rather extensive comments leading up to his request for a lawyer are all protected under the rule of *Doyle*. But in light of this record, we cannot say the prosecutor used defendant's exercise of his right to remain silent against him. The prosecutor's comments were directed not to defendant's invocation of his rights at the end of the interview, but to his other comments during the course of the interview. These included his statements to the effect that he did not commit a crime. The prosecutor cannot be said to have used defendant's failure to proclaim innocence against defendant because defendant did not fail to proclaim his innocence. (See *Phelps v. Duckworth* (7th Cir. 1985) 772 F.2d 1410, 1412 [en banc] [where defendant proclaimed his innocence after receiving *Miranda* warnings and told an exculpatory story, no *Doyle* violation when prosecutor used these statements to impeach the different exculpatory story defendant told at trial]; see also *Anderson v. Charles* (1980) 447 U.S. 404, 408-409 [no *Doyle* violation where defendant told one exculpatory story at the time of his arrest and prosecutor used it to impeach a different exculpatory story he told at trial].)

At most, the record would support the contention (not made by defendant) that the prosecutor misstated the evidence.[4] Defense counsel's objection—"She's completely wrong"—is perhaps best understood as making that contention. But any error the court committed in overruling that objection was harmless under any standard. The jury was shown the videotape, provided with transcripts while the tape was playing, and given the tape to take into the jury room. It was also instructed that arguments of counsel are not

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[4]Later in her closing argument, the prosecutor did quote defendant's statement, "'Like so young you know, and then there's nothing more than that.… We playing around, you know. That's all we do.'"

evidence. Without a showing to the contrary, we must assume that the jury followed the court's instructions. (*People v. Talhelm* (2000) 85 Cal.App.4th 400, 409; *Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 478-479.) Accordingly, we assume the jury relied on defendant's actual statements and not on the prosecutor's incorrect description of them. Further, the misstated evidence was not of great significance in light of the other strong evidence of guilt, including the DNA evidence and Victim 1's testimony and statement to Officer Vincent.

IV. Amendment of the information

After an initial filing and dismissal, the People filed a complaint on June 27, 2002. Defendant pleaded not guilty and waived his right to a preliminary hearing. On July 22, 2002, the People filed an information. The information altered the Penal Code sections under which defendant was charged in four of the counts. Defendant pleaded not guilty to the information. There is no indication in the record that before pleading he lodged any objection to the alterations. The People filed an amended information on September 4, 2002. The amended information again changed the sections under which some counts were charged and added new counts. Defendant again pleaded not guilty. Again, the record does not reflect any objection to the alterations. There is also no indication that defendant ever waived a preliminary hearing on the new charges.

Defendant argues that his convictions on five of the counts must be stricken because the differences between the complaint and the amended information violated section 1009. Section 1009 provides: "An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination."

Where, as here, the preliminary hearing has been waived, we have held that the People may not, after the waiver and over objection, amend the information to charge a new offense. (*People v. Winters* (1990) 221 Cal.App.3d 997, 1007.) But where the court erroneously tries a defendant on a charge which has not been supported by evidence at a

preliminary hearing, and where a preliminary hearing has not been waived, the defendant waives the error by failing to object. (*People v. Burnett* (1999) 71 Cal.App.4th 151, 179.) Here the record discloses no objection by defendant, and defendant does not contend that he objected. We conclude defendant waived the issue.

In his reply brief, defendant contends that if he waived, his waiver was due to the ineffective assistance of his trial counsel. But defendant has not even attempted to sustain his burden under *Strickland v. Washington, supra*, 466 U.S. at page 694 of showing a reasonable probability that, but for his counsel's purported missteps, "the result of the proceeding would have been different." What could counsel have achieved by objecting to the amendments? Defendant does not say. We may suppose that he might have secured a preliminary hearing on the added and altered charges, or perhaps could have forced a dismissal and refiling. There is no reason to believe, however, that this would have made any difference. Defendant does not argue, for example, that if he had insisted on a preliminary hearing after the amendments, the prosecution would have been unable to support the charges. We conclude that defendant has not shown ineffective assistance of counsel.

V. Cumulative error

Defendant argues that even if we find that any errors committed by the court were nonprejudicial taken separately, they warrant reversal collectively. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) But we affirm despite multiple, otherwise harmless errors, if "the whole of [the trial errors] did not outweigh the sum of their parts." (*People v. Roberts* (1992) 2 Cal.4th 271, 326.)

We have found that the admission of Victim 2's statements was error, that this error was grounds for reversal on counts 1, 7, 9 and 10, and that it was harmless as to counts 3, 4, 5, 6, 8, 11 and 12. We have also found that allowing the prosecutor to

misstate the evidence of defendant's police interview was potentially an error, but harmless.

Reversible cumulative error could exist here only if the prosecutor's misstatement and the admission of Victim 2's statements add up to an error greater than the sum of its parts affecting counts 3, 4, 5, 6, 8, 11 and 12. As explained above, Victim 2's statements had no bearing on counts 3, 8, 11 and 12. Adding the prosecutor's harmless misdescription of evidence therefore cannot convert the admission of Victim 2's statements into reversible error as to those counts. Victim 2's statements did bear upon counts 4, 5 and 6, but, as we have explained, the prosecution's case remained very strong on those counts even without Victim 2's statements. Because of the strength of the other evidence, adding the prosecutor's misstatement to the erroneous admission of Victim 2's statements does not give rise to a reasonable doubt that the result would have been the same without the errors. We conclude that no additional convictions should be reversed based on cumulative error.

DISPOSITION

The judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

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Wiseman, Acting P.J.

WE CONCUR:

_____
Gomes, J.

_____
Dawson, J.